IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 04.06.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Appeal Suit No.600 of 1992

Tr.A.S.Nos.218 & 219 of 1997

1. Rachayee Ammal
2. Kaliammal
3. Chellammal
4. Palaniammal

... Appellants in A.S.No.600 of 1992/ Plaintiffs
... Appellants in Tr.A.S.No.218 of 1997/ Defendants

V.Palaniammal ... Appellants in Tr.A.S.No.219 of 1997/ Plaintiff

Vs.

1. Kaliannan
2. Saradambal
3. Special Office,
   Salem Co-operative Sugar Mill,
   Mohanur,
   Namakkal Taluk,
   Salem District.

... Respondents in A.S.No.600 of 1992/ Defendants

Kaliannan

... Respondents in Tr.A.S.No.218 of 1997/ Plaintiff

1. Kaliannan
2. Saradambal
3. Veerappan ...Respondents in Tr.A.S.No.219 of 1997/ Defendants

PRAYER: First Appeal against the Judgment and decree dated 26.06.1992 made in O.S.No.70 of 1988 on the file of Court of the Subordinate Judge, Namakkal.

WEB COPY

For Appellants : Mr.M.Venkatachalapathy, S.C.
for Mr.N.Damodaran
Mr.Mani

For Respondents : Mr.S.Parthasarathy, S.C.

https://hcservices.ecourts.gov.in/hcservices/

for Saravabhuman Associates
for R1 and R2
Mr.V.Ravi Spl.G.P.(A.S) for R3

J U D G M E N T

The plaintiffs 1 to 4 in O.S.No.70 of 1988 are the appellants in A.S.No.600 of 1992. The said suit was filed for a declaration that an amount of Rs.13993.88 being the price of sugarcane lying with the third defendant is belonging to the plaintiffs or in the alternative for a decree of partition and allotment of 4/10th share, apart from declaring that the item 2 of the suit property belonging to the plaintiffs or in the alternative granting 4/10th share and for a permanent injunction against the defendants 1 and 2 from carrying on agricultural operation alternatively praying for the decree of partition and allotment of 4/10th share to the plaintiffs in the suit properties.

2. Among the plaintiffs in the suit, the first plaintiff is the mother and other plaintiffs are her daughters. The first defendant is the son of the first plaintiff and the brother of the other plaintiffs and the second defendant is the wife of the first defendant. It is also now admitted by the learned Senior Counsel appearing for the appellants across the bar that the appellants 1 to 3, who were plaintiffs 1 to 3 in the suit, have joined with the respondents 1 and 2, namely, the defendants 1 and 2 in the suit and only the 4th defendant who is the 4th appellant is conducting the proceedings.

3. The case of the plaintiffs in the suit is that there are 6 items of properties out of which the first item is relating to the amount of Rs.13,993.88 pending with the third defendant and the second item consisting of value of 6 shares at Rs.4,000/- given by the third defendant in favour of the first plaintiff's husband Late Veerappa Gounder and others are landed properties. The case of the plaintiffs is that the husband of the first plaintiff and the father of the other plaintiff and the first defendant Veerappa Gounder, died on 08.05.1987. Even during his lifetime he has orally partitioned the properties between himself and the first defendant and they were doing agricultural operations separately by supplying sugarcane to the third defendant mill. The first plaintiff’s husband during his lifetime has executed a will dated 24.12.1986 bequeathing his properties in favour of the first plaintiff during her life time and thereafter to be absolutely taken by the other plaintiffs 2 to 4. After the death of the husband, the first plaintiff has supplied 60 tones of sugarcane to the third defendant at the rate of Rs.237.50 and the plaintiffs are entitled for the remaining amount.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

4. It is the case of the plaintiffs that even if it is held that there was no oral partition between Veerappa Gounder and the first defendant, the plaintiffs are entitled for partition and also entitled for the share as per the Will of Veerappa Gounder. It is also the further case of the plaintiffs that even if the Court comes to the conclusion that the Will of Veerappa Gounder is not proved, as per the Hindu Succession Act, the plaintiffs are entitled for 4/10th share and the defendants are entitled for 6/10th share in the suit properties.

5. The first defendant has filed the written statement. While admitting the relationship between the parties, the first defendant denies the allegation of oral partition between Veerappa Gounder and the first defendant. According to the first defendant, the said Veerappa Gounder and himself were enjoying the specified portions for convenient purposes and they formed part of the Hindu Undivided Joint Family till the death of Veerappa Gounder. According to the first defendant, his father Veerappa Gounder along with his brother by name Palaniyandy and his two sons Kaliyannan and Veerappan, apart from the said Veerappa Gounder's father Muthu Veerappa Gounder and the said Veerappa Gounder's mother Karupayee have divided the properties under a registered partition deed on 14.04.1972. In the said partition deed, the first defendant as well as his father Veerappa Gounder were parties and they were allotted jointly A Schedule properties in the said partition deed and after allotment they continue to be in joint possession. The first defendant also denied the execution of a Will by Veerappa Gounder on 24.12.1986 and therefore, the claim of the plaintiffs that the first plaintiff has a life interest and other plaintiffs have vested remainder, was also denied. According to the first defendant, even if the Will is true the same is not valid in law, since the first defendant's father himself has no right to execute a Will bequeathing a specified item of joint property, since the same does not exclusively belong to him.

6. As per the partition deed dated 14.04.1972, it was the first defendant and his father Veerappa Gounder who got the properties, while so, the claim of the plaintiffs as if Veerappa Gounder by a Will dated 24.12.1986 gave all his properties in favour of the plaintiffs is not maintainable, since there was no division between the said Veerappa Gounder and the first defendant and therefore, according to the first defendant the Will is not valid as per Section 30 of Indian Succession Act. It is the further case of the first defendant that the said Veerappa Gounder has in fact cancelled the Will dated 24.12.1986 by a subsequent Will dated 02.04.1987 by giving his undivided half share both movable and immovable properties in favour of the first defendant

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

and therefore, as per the said last will of Veerappa Gounder dated 02.04.1987, the first defendant is entitled for the entire properties and the plaintiffs have no proprietary right over any of the properties.

7. It is also the case of the first defendant that as per the said will, Veerappa Gounder has directed the first defendant to pay Rs.1,500/- per year to the first plaintiff, being his mother as maintenance till her life time and also to pay Rs.1,000/- each to plaintiffs 2 to 4 as legacy which amount the first defendant is always ready and willing to pay. It is also the first defendant's case that the will executed by his father on 02.04.1987 was given when he was in a sound state of mind. The first defendant also further denies the oral partition between him and Veerappa Gounder prior to 24.12.1986. The third defendant has filed written statement stating that in respect of supply of sugarcane, an amount of Rs.13,993.88 has been sent to Canara Bank, Mohanoor in the account of Veerappa Gounder. That apart from the third defendant there is no amount due to Veerappa Gounder. It is also denied by the third defendant that the first plaintiff has supplied 60 tones of sugarcane to the third defendant.

8. The fourth plaintiff in the above said suit has filed O.S.No.387 of 1991 against the defendant for a permanent injunction in respect of the above said properties in the Subordinate Court, Namakkal (O.S.No.347 of 1990 District Munsiff Court, Namakkal) on the same averments namely, relying upon the "Will" of Veerappa Gounder dated 24.12.1986 and also stating that based on the will when the plaintiff in the said suit has proceeded to reap the crops the defendants have obstructed and therefore, the suit for injunction was filed. The first defendant in the said suit has also filed a written statement in the same line was filed in the previous suit basing reliance on the will of his father dated 02.04.1987.

9. The first defendant in the above suit has filed a suit in O.S.No.108 of 1991 on the file of the Subordinate Court, Namakkal (O.S.No.669 of 1991, District Munsiff Court, Namakkal) against the plaintiffs in O.S.No.70 of 1988 for a declaration that the plaintiff is entitled for all the suit properties on the basis of the Will of his father Veerappa Gounder dated 02.04.1987 and also stating that Veerappa Gounder and himself have obtained the properties under a partition deed earlier and they were in joint possession and Veerappa Gounder who had no right of executing a Will earlier on 24.12.1986 has cancelled the Will and then subsequently made his last Will of 02.04.1987 bequeathing his undivided share in his favour. The defendant in the said suit has also filed a written statement contending inter-alia what they have stated in the plaint in O.S.No.70 of 1988. All the three

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

suits were taken together for trial.

10. The Trial Court has framed issues including, as to whether the third defendant in O.S.No.70 of 1938 is a necessary party and as to whether there was any amount lying with the third defendant to be paid to the Veerappa Gounder apart from the issue as to whether the plaintiff in O.S.No.70 of 1988 are entitled for partition. The further issues framed in the other suits are, as to whether the plaintiff in O.S.No.108 of 1991 who is the first defendant in O.S.No.70 of 1988 is entitled for declaration based on the Will executed by his father Veerappa Gounder dated 02.04.1987 and as to whether the suit properties are in possession of the plaintiff in O.S.No.108 of 1991. The further issue framed in O.S.No.387 of 1991 was as to whether the Will executed by Veerappa Gounder on 24.12.1986 is true and whether the plaintiff in O.S.No.387 of 1991 who is the fourth plaintiff in O.S.No.70 of 1988 is entitled for permanent injunction. On the plaintiff side in O.S.No.70 of 1988, the fourth plaintiff who was the sole plaintiff in O.S.No.387 of 1991 was examined as P.W.1. In addition to that, three more witnesses were examined as P.W.2 to P.W.4. On the defendant side in O.S.No.70 of 1988 who is also plaintiff in O.S.No.108 of 1991 the first defendant in the said suit Kaliyannan was examined as D.W.1. In addition to that there were four more witnesses who were examined as D.W.2 to D.W.5. On the side of the plaintiff Exs.A.1 to A.17 were marked and on the side of the defendants Exs.B.1 to B.21 were marked apart from the Commissioner report and sketch were marked as Exs.C.1 and C.2.

11. On analysis of the entire evidence and appreciation of documents, the Trial Court has dismissed O.S.No.70 of 1988 filed by the plaintiffs therein claiming for partition and decreed the suit filed by the first defendant in O.S.No.70 of 1988, namely, O.S.No.108 of 1991 declaring the plaintiff in the said suit to be the owner of the entire suit properties and also dismissed the suit in O.S.No.387 of 1991 filed by the fourth plaintiff in O.S.No.70 of 1988 for injunction. It is as against the said common judgement, the plaintiff in O.S.No.70 of 1988 has filed A.S.No.600 of 1992 on the file of this Court. It is seen that as against the judgment of the Trial Court in O.S.No.108 of 1991 which was originally filed as O.S.No.669 of 1991 in the District Munsiff, the defendant therein has filed A.S.No.142 of 1993 on the file of the District Court, Salem and the said appeal was transferred to this Court in Transfer A.S.No.218 of 1997.

12. Likewise, as against the judgement in O.S.No.387 of 1991 the plaintiff therein has filed A.S.No.143 of 1993 on the file of the District Court, Salem which was transferred to this Court and numbered as Transfer A.S.No.219 of 1997 and all the three appeals were taken together jointly. As per the contention, as stated

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

above, in respect of all the four plaintiffs in O.S.No.70 of 1988 who are all the appellants in A.S.No.600 of 1992 the appellants 1 to 3 who are the mother and sisters respectively of the first respondent (First defendant in the suit) have gone to the side of the respondent and therefore, it is only the fourth appellant Palaniyammal who is the fourth defendant in the said suit who is contesting. She was the plaintiff in O.S.No.387 of 1991 for a permanent injunction filed based on the Will executed by her father Veerappa Gounder dated 24.12.1986 which was dismissed and also fourth defendant in the suit filed in O.S.No.108 of 1991 filed by the first defendant in O.S.No.70 of 1988 for a declaration that the Will executed by his father Veerappa Gounder on 02.04.1987 is valid and he is entitled for the entire suit property. It is seen that the relationship between the parties are admitted. While it was the case of the fourth plaintiff in O.S.No.70 of 1988 who was examined as P.W.1 that there was a oral partition between her father Veerappa Gounder and his brother first defendant Kaliyannan based on which the father was living on the Western side and the brother was living on the Eastern side separately. Even though she had admitted that there was no partition deed between them ,her case was that it was a oral partition effected 15 years before.

13. It is to substantiate her contention she had examined P.W.4 one Dhanapal who has chosen to state that there was a oral partition between the first defendant and his father Veerappa Gounder and the said witness was unable to point out what are the other lands available adjacent to the said lands. He has also admitted that he was involved in a murder case and he was not living in Mohanoor Village at all and living in Vettapalayam. The Trial Court has also found that P.W.1 herself was not able to specify as to what are the lands which were divided between her father Veerappa Gounder and the first defendant her brother. It is seen under Ex.A.1 that Veerappa Gounder died on 08.05.1987 and the plaintiffs especially 4th plaintiff in O.S.No.70 of 1988 has relied upon the Will stated to have been executed by her father Veerappa Gounder dated 24.12.1986 marked as Ex.A.2. It is her case that under Ex.A.2 the life interest was given in the suit properties to her mother the first plaintiff and after her life time vested remainder was given to all other plaintiffs who are her sisters.

14. It is also admitted that Ex.A.2 will is a registered Will. It is seen that as found by the Trial Court Ex.A.2 produced by the plaintiff has not been proved in the manner known to law. The attesting witness under Ex.A.2 Will who was examined as P.W.2 Shankara gounder even though has examined himself in the chief examination, has not submitted himself for cross examination and therefore, the Trial Court has correctly found that his evidence

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

cannot be considered for the purpose of deciding as to whether the Ex.A.2 Will has been proved. It is also found by the Trial Court that P.W.4 one Dhanapal was examined on the side of the plaintiff who is stated to have been the scribe of Ex.A.2. It is seen from his evidence that even though he has written Ex.A.2 Will since he is an authorized scribe in the registrar office, he would admit that he does not know who has executed Ex.A.2 and who has signed as attesting witness. The Trial Court has also considered the specific evidence of P.W.4 saying that he has not seen Veerappa Gounder signing Ex.A.2. Therefore, on the analysis of the evidence, the Trial Court has come to the conclusion that Ex.A.2 cannot be stated to have been proved, the Trial Court has also found that the claim of the plaintiff that there was a oral partition between Veerappa Gounder and his son the first defendant Kaliyannan has also not been proved on the basis that the plaintiff herself is not able to explain as to what are the portions given to the first defendant and what were the remaining portions kept by Veerappa Gounder and there was no independent evidence also.

15. On the other hand the first defendant in O.S.No.70 of 1988 has relied upon a Will executed by his father Veerappa Gounder dated 02.04.1987 marked as Ex.B.1 and after executing the said Ex.B.1 Will his father Veerappa Gounder died 08.05.1987. It is to prove the said Ex.B.1 Will the defendant has examined the attesting witnesses of the said Will as D.W.2 and D.W.3. Even though it was the contention of the plaintiff that the said defendant witnesses have stated that in Ex.B.1 Will there was no mentioned about the previous Will and therefore, the said witnesses cannot be believed, on the factual finding that D.W.2 and D.W.3 are not having any enmity towards the plaintiff and the trial court has come to the conclusion that Ex.B.1 has been proved through attesting witnesses in the manner known to law. It was on that basis the Trial Court has dismissed the suit in O.S.No.70 of 1988 and also decreed the suit filed by the first defendant in the said suit, namely, in O.S.No.108 of 1991.

16. Mr.Venkatachalapathy, learned Senior Counsel appearing for the plaintiff would submit that it remains the fact that Ex.A.2 Will executed by Veerappa Gounder was a registered one and the same has been admitted even in the subsequent Will of Veerappa Gounder marked as Ex.B.1. The main contention is that when the second will which is relied upon the first defendant was executed on 02.04.1987 and the said Veerappa Gounder died in a matter of one month, namely, 08.05.1987 it creates a cloud as to whether Veerappa Gounder was in sound state of mind. He would also submit even assuming that Ex.B.1 Will executed by Veerappa Gounder dated 02.04.1987 is valid, the present suit was filed on 24.02.1988 and from the date of death of Veerappa Gounder who died on 08.05.1987

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

the first defendant has not taken any steps to pay any amount to the first plaintiff his mother, the amount of Rs.1,500/- as maintenance per annum as contemplated under Ex.B.1 itself and also to the plaintiffs 2 to 4 Rs.1,000/-. This also according to the learned Senior counsel shows that the Will relied upon by the first defendant cannot be taken to have been properly executed.

17. His further contention is that when the Will relied upon by the first defendant under Ex.B.1 excludes the entire line of legal heirs on the female side it is for the first defendant to explain the same. He would also submit that inasmuch as the second Will relied upon by the first defendant marked as Ex.B.1 contains a clause in respect of Ex.A.1 Will dated 24.12.1986 there is no need or necessity for proving the said Ex.A.1 Will at all. He would submit that in such circumstances the onus is upon the first defendant to prove as to whether Ex.B.1 Will was properly executed. According to him there has been a contradiction in evidence and therefore, the Will cannot be stated to have been proved. He would also submit that even though a Commissioner's report has been filed marked as Ex.C.1 and C.2 the Trial Court has not taken it into consideration. He would rely upon the judgement of the Hon'ble Supreme Court reported 2005(1) SCC 280 and 1992(2) SCC 507 to show that in cases of suspicious circumstances the person who rely upon the Will should prove in accordance with law.

18. On the other hand, Mr.S.Parthasarathi, learned Senior Counsel appearing for the respondent, while admitting that Ex.B.1 Will which is relied upon by his client states about the earlier Will of Veerappa Gounder dated 24.12.1986 marked as Ex.A.2, and there is no necessity to prove Ex.A.2 because even as per the recital in Ex.B.1, A2 stood cancelled. He would also fairly submit that as per Section 68 of the Indian Evidence Act, even if there is no denial of execution of a Will the same has to be independently proved. He would submit as per the combined reading of Section 68 of Indian Evidence Act, and Section 63(c) of the Indian Succession Act, the Will has to be proved. It is in view of that he would submit it is not even the case of the plaintiff that at the time when Ex.B.1 was executed by Veerappa Gounder in favour of the first defendant, the said Veerappa Gounder was not in a sound state of mind. Apart from the fact that when D.W.1 was cross examined, a suggestion was put to him that Ex.B.1 was forged one, there was no pleading about the forgery and there was no proof at all, especially in the circumstance, that attesting witnesses D.W.2 and D.W.3 have categorically spoken about the execution of Ex.B.1 in the manner known to law. He would also submit that merely because a Will is unregistered that itself cannot be a ground for raising suspicion. He would also submit that the very fact that adangal and other public documents including the patta stood transferred in the name of the first

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

defendant after the execution of a Will shows that Ex.B.1 Will has been acted upon. As far as the objection regarding Commissioner's report, it is the case of the learned Senior Counsel that inasmuch as the Commissioner's report was intended only for the purpose of speaking about the prior partition and the Commissioner's report cannot say anything as to who is in possession, there was no necessity to deal with such report at all since that was not the issue involved in this case. Therefore, according to the learned Senior Counsel the reasoning given by the Court below is based on proper appreciation of evidence and the same can never be held to be wrong and therefore, there is absolutely nothing to interfere.

19. After hearing the learned Senior Counsel for the appellant as well as the respondent and on perusal of the entire records the point that arise for determination in this is case as to whether

1) the first defendant in O.S.No.70 of 1988 and his father Veerappa Gounder have orally divided among themselves and living separately?

2) the Will stated to have been executed by Veerppa Gounder in favour of the plaintiff in O.S.No.70 of 1988 marked as Ex.A.1 dated 24.12.1986 is valid and stood proved.

3) the Will stated to have been executed by Veerappa Gounder in favour of the first defendant in O.S.No.70 of 1988 on 02.04.1987 stood proved.

20. As I have stated earlier the relationship between the parties are not in dispute, namely, the first plaintiff Rachayeeammal in O.S.No.70 of 1988 is wife of late Veerappa Gounder and plaintiffs 2 to 4 are their daughters while the first defendant his son and the second defendant is the wife of the first defendant. It is also not in dispute that Veerappa Gounder died on 08.05.1987 as it is seen in Ex.A.1 death certificate. It is also not in much dispute by the defendants that Veerappa Gounder has executed originally a Will dated 24.12.1986 marked as Ex.A.2 under which the said Veerappa Gounder has given life interest to his wife the first plaintiff Achayeeammal and after her death vested remainder to all other plaintiffs who are the daughters, thereby not giving any property to the first defendant who is admittedly his son born through Rachayeeammal. It is seen under Ex.B.2 partition deed dated 14.04.1972, which is a registered document entered between the father and mother of Veerappa Gounder, namely, Muthu Veerappa Gounder and Karuppayee Ammal along with their sons Veerappa Gounder and Palaniyappa Gounder under which the A Schedule properties which are the properties in the suit were allotted to the said Veerappa Gounder along with his son Kaliyannan who is the first defendant in the suit. It is also relevant to point out that under the said registered partition deed the first defendant was arrayed as 4th

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

party while his father as a third party and both of them were jointly given the A Schedule properties.

21. It was thereafter as it is seen in Exs.B.3 to B.13, which are either house tax receipt or kandayam receipts which show that Veerappa Gounder during his lifetime has been paying various public dues regarding the properties. This is also strengthened by the documents filed on the side of the plaintiff marked as Ex.A.3 to A.9. In such factual situation and as per the construction of Ex.B.2 partition deed, it is clear that Veerappa Gounder and the first defendant Kaliyannan had jointly got the suit properties. This is also not in dispute because it is the specific case of the plaintiff that Veerappa Gounder and his son the first defendant have subsequently orally portioned among themselves and they have been living separately. Therefore, it is not only clear from the version of the plaintiff themselves that Veerappa Gounder and the first defendant have been the joint owners of the suit property under Ex.B.2. If it is their case that they have partitioned among themselves orally, it is for the plaintiff's to prove the same. The 4th plaintiff who was examined as P.W.1 had clearly admitted that there was no written partition between Veerappa Gounder and the first defendant but her case is that they have partitioned orally among themselves and Veerappa Gounder was living on the Western side and the first defendant was living on the Eastern side. The P.W.1 who has chosen to state in the evidence that 15 years before, the partition was effected between Veerappa Gounder and the first defendant but the same was not pleaded in the pleading at all. As correctly found by the learned Trial Judge, P.W.1 herself is not able to tell what are the extent of lands owned by each of them, namely, Veerappa Gounder and the first defendant. It is relevant to point out that if at all there was oral partition between Veerappa Gounder and the first defendant, it was only the first plaintiff Rachayeeammal wife of Veerappa Gounder who alone was competent to depose about such fact. On the other hand, it is seen that the first plaintiff was not examined at all as a witness.

22. On the other hand, P.W.3 one Danapal stated to have been the neighbor was examined to prove that the Veerappa Gounder and the first defendant were living separately. While the suit properties are situated in Mohanoor, the said P.W.3 clearly states that he was not living Mohanoor but living in Vettapalayam. In the cross examination he has also stated that he is an accused in a murder case and he was not able to tell properly the boundaries between the suit properties. On the appreciation of the said evidence the Trial Court has correctly come to the conclusion that the allegation by the plaintiffs that there was a oral partition between Veerappa Gouder and the first defendant 15 years ago and they have been living separately, has not been proved. There is

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

absolutely nothing wrong in the finding of fact arrived at by the Trial Court in this regard warranting this Court to interfere.

23. Even assuming for argument sake that there has been a partition which on fact has not been proved, the next point to be considered is as to whether Veerappa Gounder had a right to bequeath the entire suit properties in favour of the plaintiffs. It is not denied that Veerappa Gounder and the first defendant have been joint owners and even as per the plaintiffs it was divided among them. Therefore, the right of the first defendant over the suit property is not denied by the plaintiffs themselves. On the face of it there is no difficulty to come to the conclusion that the said Veerappa Gounder who was not the absolute owner of the suit property who remained undivided along with his son, the first defendant would not have bequeathed the suit properties in favour of the plaintiff, for, he had no right over any specified property and in such circumstances especially when it is not even the case of the plaintiff that Veerapa Gounder has given his undivided share of the suit property in favour of the plaintiff, the onus is certainly heavily on the plaintiff in O.S.No.70 of 1988 to prove, not only that Veerappa Gounder was having exclusive right over the suit property but also to prove the genuiness of such Will. Again on appreciation of the evidence the Trial Court has correctly come to the conclusion that not only that Veerappa Gounder had no exclusive right over the suit properties but the plaintiff have miserably failed to prove the genuiness of Ex.A.1. In such circumstances, it is difficult to accept the contention raised on behalf of the appellants that when Ex.A.1 is a registered Will, Ex.B.1 which is unregistered and within one month from the date of execution of Ex.B.1 Veerappa Gounder died and therefore, it creates a suspicion. Whether Will is registered or unregistered the same has to be proved in the manner known to law. It is to prove Ex.A.1 the attesting witness was examined as P.W.2 and it is seen on record as it is found by the Court below that having given evidence in the chief examination, he has not submitted himself for cross examination and therefore, his evidence is unworthy, to be relied upon. The only other witness is P.W.4 who is stated to be the scribe of Ex.A.2. The evidence of P.W.4 is clearly against the very case of the plaintiff. It is admitted at the out set that P.W.4 is a licensed document writer. He has state in chief examination as follows:

> "I am a licensed document writer. I wrote Ex.A.2. I do not remember the persons. A.2 was written in Mohanoor. I have prepared the Will and given to parties. I do not know about the factum of signature under Ex.A.2 or witnesses, who have signed under Ex.A.2. One Veerappan has requested me to write the Will."

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

In the cross examination more interestingly he says

> "I have not seen Veerappan or attesting witnesses signing Ex.A.2. I have prepared Ex.A.2 and signed as a person prepared. After preparing I give it to the parties."

24. On the face of the two witnesses P.W.2 and P.W.4, there is absolutely no difficulty to come to the conclusion that Ex.A.2 has not been proved in the manner known to law. As far as the Will is concerned, Section 63(c) of the Indian Succession Act, contemplates the Will to be attested. The said provision runs as follows:

> "(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has been some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other persons; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

25. The said provision of Indian Succession Act, read with Section 68 of the Indian Evidence Act 1872 which runs as follows:

> "68. Proof of execution of document required by law to be attested
>
> If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

Shows that if it is a Will even if it is registered the same has to be proved through the attesting witnesses. In the present case

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

as correctly found by the learned Trial Court, the execution Ex.A.2 has not been proved in the manner known law.

26. In any event, inasmuch as the first defendant makes claim on the basis of the subsequent Will dated 02.04.1987 marked as Ex.B.1 which also contains a recital about the Ex.A.2 Will dated 24.12.1986 by specifically cancelling the said Will, as correctly pointed out by the learned Senior Counsel appearing for the respondents the decision about the proving of Ex.A.2 Will is only academic in nature. It is also relevant to point out that when once Ex.B.1 is a later Will of Veerappa Gounder, it is a common knowledge that the later Will alone should prevail. Merely because Ex.B.2, the latter Will has not been registered, there is no reason to suspect the genuiness of the said Will. Further, simply because the testator Veerappan under Ex.B.1 Will having executed Will on 02.04.1987 and died on 08.05.1987, that itself cannot be a ground for arriving at a conclusion that there is suspicion about the Will. It is true that when the first defendant has come forward with a defense based on the Will executed by Veerappa Gounder dated 02.04.1987, the plaintiff have not even chosen to plead that Veerappa Gounder was not in a sound state of mind at the time Ex.B.1 was executed.

27. However, as I have stated earlier whatever may be the circumstance, simply because the execution of the Will is not denied, it will not exonerate the person who rely upon the Will to prove the genuiness of the Will as per the combined reading of Section 63(c) of the Indian Succession Act along with Section 68 of the Indian Evidence Act. Now the only point that remains to be considered is as to whether the first defendant in O.S.No.70 of 1980 has proved Ex.B.1 Will. It is seen on evidence that as far as Ex.B.1 Will is concerned two attesting witnesses of the said Will namely, D.W.2 and D.W.3 were examined. A reference to the evidence given by both the witnesses would show, as correctly found by the learned Trial Judge that both the witnesses have in fact stated that the said Veerappa Gounder was in a sound state of mind at the time when he signing the Will and they have seen the testator signed the Will apart from the other witnesses namely Rangasamy and Ponnusamy and thereafter they have signed as attesting witnesses. Therefore, as required under Section 63(c) of the Indian Succession Act, the attestation has been effected and the same has been proved through attesting witnesses as per Section 68 of the Indian Evidence Act and a reference to the evidence of D.W.2 and D.W.3 out of whom the D.W.2 says "Veerappa Gounder put his two signatures at the time of signing he was hale and healthy and sound state of mind, myself Rangasamy D.W.3 and Ponnusamy have seen Veerappa Gounder signing the Will thereafter we have put our signatures Veerappa Gounder saw as putting our signatures".

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

28. Even though it is the case of the plaintiffs that D.W.2 has stated that Veerappa Gounder has not mentioned anything about the Will given to the daughters and on the other hand Ex.B.1 Will refers about the earlier will of Ex.A.2 given to daughters and therefore, this is a contradiction, I do not think that there is any contradiction on the material aspect which is required for the purpose of proving the Will. In fact both the witnesses D.W.2 and D.W.3 have clearly stated even the place where they were asked to assemble for the purpose of signing the will as attesting witnesses, as correctly found by the Court below. It is in this regard relevant to point out the contents of Ex.B.1 Will. A reference to the said Will shows that in fact the earlier Will executed by Veerappa Gounder dated 24.12.1986 has been done on a wrong facts and after realizing the truth including that there was no partition between him and his son, namely, the first defendant and also referring to the earlier partition dated 14.04.1972, the testator has clearly stated that he is giving his share of the property in favour of the first defendant. Merely because the first defendant has not paid Rs.1,500/- to the first plaintiff as maintenance and also to other plaintiffs Rs.1,000/- the same will not be sufficient to come to the conclusion that Ex.B.1 Will is either not valid or not proved in the manner known to law.

29. In fact as correctly pointed out by the learned Senior counsel for the respondent, after the Will the first defendant has acted upon the same by effecting transfer of adangal, patta, etc., in his name and he is possession of the property. While dealing about the requirement of registration of the Will and also by providing a portion for the daughter's marriage stating that the same is not unnatural and registration is not a requirement for a Will, the Hon'ble Supreme Court in Ishwardeo Narain Singh Vs. Sm.Kamata Devi and others and others reported in AIR 1954 SC 280 has held as follows:

> "(3) As regards the other ground, the trial judge who had the attesting witness before him was satisfied that his evidence could not be brushed aside lightly and could be safely relied on as correct. The High Court, however, took the view that the due execution of the will had not been proved and that the evidence of the only attesting witness Sahdeo Singh could not be accepted in view of the surrounding circumstances. The first circumstance referred to was that the will was an unnatural will. The testator had no male issue but had only one minor daughter. His wife had predeceased him and he had not married a second wife. By his will he made provision for the marriage of his daughter out of certain specified part of his estate.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

> The rest of his properties he gave to Thakurji. We see nothing unnatural or unofficious about this Will."
> (4) The High Court has relied on the fact that the will was not registered or deposited with the District Registrar. There is nothing in law which requires the registration of a Will and Wills are in a majority of cases not registered at all. To draw any inference against the genuineness of the will on the ground of its non-registration appears to us to be wholly unwarranted."

30. In respect of the exclusion of a person from the benefit of the Will While dealing with the absence of adoption stated in a Will the Privy Counsel in the case of Mt.Gomtibai Vs. Kanchhedilal and others reported in AIR 36 (1949) Preview Council 272 and also dealing with undue influence and other invalidating factor hold that the same must be pleaded and proved on fact, as follows:

> "Undue influence, in order to invalidate a will, must amount to coercion or fraud. Its existence must be established as a fact and it must also appear that it was actually exercised on the testator."

In any event on the facts of this case, no one of the vitiating factors are either pleaded or proved.

31. The jurisdiction of the Court to decide as to whether the disposition under the Will is fair or just while setting as a First Appellate Court came to be decided by this Court in Chinnammal (died) and another Vs. Kannagi and others reported in AIR 1989 Madras 185 wherein this Court has held as follows:

> "In a case where the execution is proved by cogent and acceptable evidence, the Court should not disbelieve the Will on the basis of so-called suspicious circumstances unless those circumstances would render the execution of the Will an utter improbability very near to impossibility. Once the will is proved to be true and it was executed by the testator, it is not for the Court to embark upon an enquiry whether the dispositions made therein are fair and just."

32. Regarding the suspicious circumstances, which can be the grounds for the Courts to interfere, the Hon'ble Supreme Court has held depriving of natural heirs should not raised any suspicion because the idea behind the execution of a Will is to make a deviation from the natural line of succession. By referring to various judgements on the issue and on various legal aspects and the pronouncements rendered in Uma Devi Nambiar and others Vs. T.C.Sidhan (Dead) reported in 2004(2) L.W.852 the Hon'ble Supreme

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Court has held as follows:

"15. Section 63 of the Act deals with execution of unprivileged Wills. It lays down that the testator shall sign or shall affix his mark to the Will or it shall be signed by some other person in his presence and by his direction. It further lays down that the Will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator. Section 68 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') mandates examination of one attesting witness in proof of a Will, whether registered or not. The law relating to the manner and onus of proof and also the duty cast upon the Court while dealing with a case based upon a Will has been examined in considerable detail in several decisions of this Court (See H.Venkatachala Iyengar Vs. B.N.Thimmajamma and Others. (AIR 1959 SC 443), Rani Purnima Debi and Anr.Vs. Kumar Khegendra Narayan Deb and another (AIR 1962 SC 567) and Shashi Kumar Banerjee and others Vs. Subodh Kumar Banerjee and others (AIR 1964 SC 529)). A Constitution Bench of this Court in Shashi Kumar Banerjee's case (supra) succinctly indicated the focal position in law as follows:

"The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63, Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the Will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes part in the execution of the Will which confers a substantial benefit on him that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations."

16. A Will is executed to alter the ordinary mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in PPK Gopalan Nambiar Vs. PPK Balakrishnan Nambiar and others (AIR 1995 SC 1852) it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstance, the Court has to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations (See Puspavati and Ors. Vs. Chandraja Kadamba and Others (AIR 1972 SC 2492)). In Rabindra Nath Mukherjee and Anr. Vs. Panchanan Banerjee (dead) by LRs.and Others (1995(4) 459), it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

some cases partly."

33. Applying the dictum laid down by the Hon'ble Supreme and also this court and also various provisions of the Indian Evidence Act and Indian Succession Act, as correctly found by the learned Trial Judge, the first defendant in O.S.No.70 of 1988 has proved the Will executed by Veerappa Gounder under Ex.B.1 and inasmuch as the finding by the Court below that there was no oral partition between Veerappa Gounder and the first defendant, that Ex.B.2 partition deed dated 14.04.1972 stood proved on the reasons given by the Court below in detail, which do not require interference since the reasoning based on the appreciation of facts and the same are not wrong. There is absolutely nothing to be interfered with the judgement and decree passed by the Trial Court.

34. In view of the same, the judgement and decree passed by the Trial Court are confirmed and the First Appeal stands dismissed with cost. Consequently connected Transfer Appeals are also stand dismissed, without cost.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

nbj

To

1. The Subordinate Judge,
Namakkal.

2. The Section Officer, VR Section,
High Court, Madras.

1 cc to Saravhuman Associates, SR. 31739
1 cc to Government Pleader, Sr. 31752
1 cc to Mr.P. Srinivas, Advocate, Sr. 31592

A.S.No.600 of 1992

AKR (CO)
kk 27/6

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/